

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32**

**(Oakland, California)**

**EDUCATION FOR CHANGE**

**Employer/Petitioner**

**and**

**Case 32-RM-801**

**EAST OAKLAND COMMUNITY  
CHARTER TEACHERS  
ASSOCIATION, CAT/NEA<sup>1</sup>**

**Union**

**DECISION AND ORDER**

Education For Change, herein called the Employer/Petitioner, operates the East Oakland Community Charter school (herein the EOCC) located at 1700 28<sup>th</sup> Avenue, in Oakland, California. On February 14, 2006, the Union filed a petition with the Public Employment Relations Board (PERB) under California's Educational Employment Relations Act requesting recognition as the exclusive collective bargaining representative of a unit of all full-time and regular part-time certificated employees employed by the Employer/Petitioner at the EOCC. In response, the Employer/Petitioner filed the instant RM petition under Section 9(c) of the National Labor Relation's Act, as amended.

The sole issue in this case is whether EOCC, a charter school, is a private employer subject to the Board's jurisdiction. The Employer/Petitioner contends that it is. The Union and PERB contend that EOCC is exempt from the Act's coverage because it

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<sup>1</sup> The name of the Union appears as modified at the hearing.

is a political subdivision of the State of California. A hearing officer of the Board conducted a hearing in this matter on April 17 and 19, 2006. The Employer/Petitioner, the Union, and PERB<sup>2</sup> participated in the hearing and they each filed post hearing briefs, which I have duly considered. For the reasons set forth below, I find that EOCC is a political subdivision exempt from the coverage of the Act within the meaning of Section 2(2). Accordingly, I am dismissing the instant petition.

### **FACTS**

#### **The Employer/Petitioner's Formation**

The Employer/Petitioner was conceived and created by Kevin Wooldridge, its Executive Officer, in late 2004/early 2005.<sup>3</sup> On January 21, the Employer/Petitioner filed its Articles of Incorporation with the California Secretary of State's office. Under the terms of the Articles, the Employer/Petitioner was organized as a Section 501(c)(3) tax exempt organization with a purpose of engaging in charitable and educational activities. On February 2, the California Secretary of State's office issued the Employer/Petitioner its certification.<sup>4</sup> On April 19, the Employer/Petitioner held its first Board of Directors meeting. The initial Board members were chosen directly by Wooldridge. At this meeting, the Board of Directors adopted a document entitled "Education For Change In

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<sup>2</sup> PERB is a California state agency that administers California's public employee labor relations laws, including the California Educational Employment Relations Act (Cal. Gov. Code Section 3540, *et. seq.*), which governs the labor relations of public schools in California. PERB filed a motion to intervene in the instant hearing. The motion was granted but their participation was limited to litigation of the non-monetary aspects of whether the Board has jurisdiction over the Employer/Petitioner. PERB also filed a motion to dismiss the instant petition on the basis that the Board lacks jurisdiction over the Employer/Petitioner. This motion was denied in order to develop a record complete enough to make a reasoned decision on the jurisdiction issue.

<sup>3</sup> All dates hereinafter are in 2005, unless otherwise indicated.

<sup>4</sup> On April 13, 2006, the Internal Revenue Service granted the Employer/Petitioner tax-exempt status under Section 501(c)(3) of the Internal Revenue Code.

Public Schools Bylaws.” The Bylaws set forth the powers and duties of the Board of Directors and the corporate officers, and describe how vacancies in these positions are filled. Although the Bylaws are silent on the mission of the organization, Wooldridge testified that it was the Employer/Petitioner’s intent when it incorporated to operate public schools.

To secure its initial financing, the Employer/Petitioner approached New Schools Venture Fund (herein New Schools), a charter management organization which solicits charitable contributions from individual donors, charitable foundations, and the federal government, and disburses them to charter schools. Much of the money that New Schools disburses is in the form of start-up grants. On March 8, New Schools notified the Employer/Petitioner that it had decided to award it a \$250,000 start-up grant. This initial grant was followed by other grants in July and March 2006 that totaled more than 3 million dollars. The key condition imposed by New Schools on these grants was that the Employer/Petitioner had to achieve various specified milestones concerning the successful opening and operation of its charter schools.<sup>5</sup> Finally, the Employer applied for and received a startup grant of \$360,000 from the California State Department of Education.<sup>6</sup>

#### The Formation of EOCC

Under the terms of the federal No Child Left Behind Act, when a public school has failed to meet designated pupil achievement levels over a five-year period, the school

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<sup>5</sup> These “milestones” included hiring a full-time CEO and a Vice President of Operations; preparing a preliminary business plan; and submitting a draft charter petition to the OUSD.

<sup>6</sup> Under California law, private schools are specifically prohibited from receiving any public funds, including startup grants. See, Cal. Ed Code §47602

is designated as a “failing school.” The No Child Left Behind Act requires that such schools have to be restructured. The law sets forth various restructuring options, including dismissing or relocating the teachers to another location and moving in a team of new teachers; changing school principals; having the school district contract with an outside school management company to run the school; or closing the school and reopening it as a charter school under a new management company. In the year 2005, there were 13 elementary schools in the Oakland Unified School District (OUSD) that were designated as failing schools. One of these schools was the Hawthorne Elementary School, located at 1700 28<sup>th</sup> Avenue, in Oakland.

In California, the state statutes regulating public and charter schools are contained in the State Education Code. The portions relevant to charter schools in particular are set forth in a section of the Education Code (i.e. §46700 et. seq.) known as the Charter Schools Act (CSA). Under the terms of §47605 of the CSA, a charter school can be created by filing a petition with an appropriate chartering authority to either create a brand new charter school or to convert an existing public school to a charter school.<sup>7</sup> To convert an existing public school, the petition must be supported by signatures from at least 50 per cent of the teachers at the school. To create a new charter school, the petition must be supported by an appropriate number of signatures from parents or teachers at the proposed school.

On March 25, the Employer/Petitioner submitted a Charter Petition to the OUSD seeking to convert Hawthorne Elementary School into EOCC - a charter school operated

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<sup>7</sup> Under Section 47602 of the CSA, no private school can be converted to a charter school.

by the Employer/Petitioner.<sup>8</sup> However, the Employer/Petitioner was unable to obtain the minimum number of teacher signatures required by the CSA. Accordingly, the Employer/Petitioner withdrew that charter petition. Thereafter, on May 17, the Employer/Petitioner submitted a new charter petition which sought to create a new charter school –EEOC. The proposed charter school would not be a conversion of the old Hawthorne Elementary School, but would be a new charter school located somewhere in the same general vicinity – i.e., the Fruitvale area of East Oakland. This new charter petition was supported by the requisite number of parent signatures.

#### Approval of EOCC's Charter by the OUSD

Under the terms of the CSA, a charter petition can be authorized by any one of three chartering authorities: (1) The local school district; (2) The County Office of Education; or (3) the State Board of Education. The Employer/Petitioner decided to submit its draft charter petition to the OUSD. As drafted, the charter petition followed the 16 element formula set forth in CSA §47605(b). In addition, the draft charter contained provisions agreeing that the records of EOCC are public records under the California Public Records Act and agreeing that all meetings of the Employer/Petitioner's Board of Director would be held in accordance with the Brown Act - California's open

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<sup>8</sup>The Employer/Petitioner also submitted a separate petition to the OUSD seeking to convert another failing school, Cox Elementary School, into a charter school. By its initial petition in this RM case, the Employer/Petitioner sought an election in a two-facility unit consisting essentially of all certificated employees employed by Education For Change at both schools. However, the Employer/Petitioner amended the instant petition to seek an election only at the EOCC facility after being advised by the Region that the unit encompassed by an RM petition must be coextensive with the unit in which the Union has demanded recognition. See, e.g., *Central Parking System, Inc.*, 335 NLRB 390 (2001) and *Standard Brands, Inc.*, 214 NLRB 72 (1974). Thereafter, at the hearing, the parties stipulated that the appropriate unit in this case is the certificated employees at the EOCC facility. Accordingly, no evidence was elicited regarding the Education For Change at Cox charter school and I make no findings herein regarding that facility.

meetings law that applies to meetings of all “public commissions, boards, and councils and other public agencies” (Cal. Govt. Code §54950).

As required by the CSA, the draft charter petition was first submitted by the Employer/Petitioner to a public meeting of the State Administrator of the OUSD<sup>9</sup> and the State Board of Education. On June 8, as further required by the CSA, a public hearing was held on the charter petition. In the meantime, the petition was submitted for review to Lianne Zimny, the Charter Schools Coordinator for the OUSD. Zimny is responsible for ensuring that all charter school petitions submitted to the OUSD comply with state charter law and federal regulations, and she evaluates whether the proposed charter school can successfully implement its academic program and goals. In particular, Zimny checks to see if the draft charter sets forth the 16 elements required by §47605 of the CSA. These 16 elements encompass factors like a description of the proposed educational program; the educational outcomes that the charter operators commit to achieving and how that academic success will be measured; the governance structure of the charter school itself; the student suspension and discipline policies; whether the charter school will handle its own labor relations or delegate those to the chartering authority; and the manner by which the staff will be covered by STRS, the Public Employee’s Retirement System, or federal social security. Moreover, in addition to these 16 required elements, the CSA sets forth other key requirements, including that the charter school not charge tuition; it must be non-sectarian; and it must be non-discriminatory.

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<sup>9</sup> OUSD is a public entity which is headed by a board whose members are elected by the general public. Due to various problems not relevant to the resolution of this case, the OUSD is currently under the direction of a state-appointed administrator.

On June 15, after completing her evaluation of EOCC's draft charter petition, Zimny issued a staff report to the OUSD and to the State Administrator. This report recommended that the charter petition be approved, albeit with certain specified clarifications and revisions.<sup>10</sup> One important revision was to the provision in the draft charter petition which granted the OUSD the right to appoint one member to the Employer/Petitioner's Board of Directors, but denied that member any voting rights. At Zimny's insistence, the charter petition was revised to reflect that any such Board member appointed by the OUSD would have full voting rights.<sup>11</sup> As revised, the charter petition was approved by the OUSD on about June 15.<sup>12</sup>

The approved EOCC petition authorized the Employer/Petitioner to open the charter school at any appropriate location in the Fruitvale area. Around this same time, the OUSD decided to cease operating the Hawthorne Elementary School. As a result, the school building formerly occupied by that school became available. The Employer/Petitioner then entered into a lease agreement with the OUSD whereby it leased space in that facility for the operation of the EOCC. Subsequently, however, the OUSD decided to continue operation of the 5<sup>th</sup> grade only at the old Hawthorne facility for one more year, so that students who had already completed grades K-4 at that facility

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<sup>10</sup> Zimny testified that the OUSD has denied several charter school petitions because the petitions did not comply with state law; the financial statements showed that the school was not likely to be able to support itself; or the OUSD was not convinced that the charter school could accomplish its stated mission. In fact, the OUSD has denied three other charter school petitions filed by the Employer/Petitioner.

<sup>11</sup> The OUSD has, to date, decided not to exercise its right to appoint a member to the Employer/Petitioner's Board of Directors. However, the record reflects that the OUSD may do so in the future if it has any concerns over the operation of EOCC; if the school is not complying with the open meeting laws; if the school fails to give students due process in discipline and expulsions; or if the school is struggling to meet the goals in its mission statement.

<sup>12</sup> It appears from the record that the revisions listed in the OUSD staff report were adopted wholesale. It is undisputed that any future material changes to the charter have to be submitted to and approved by the OUSD before they can go into effect.

could graduate as Hawthorne Elementary School graduates. Therefore, during the 2005-2006 school year, EOCC has operated as a charter school for grades K-4 at the same facility where the OUSD runs a public school for 5<sup>th</sup> graders. Starting in the 2006-2007 school year, EOCC will expand to cover the 5<sup>th</sup> grade as well, and the OUSD will cease running a 5<sup>th</sup> grade operation out of the old Hawthorne Elementary School facility.

#### The Students at EOCC

EOCC began operations as a charter school on August 28 or 29. Under the terms of §47605(d)(2) of the CSA, a charter school is required to enroll every pupil who wishes to attend that school. However, if the number of pupils who wish to attend exceeds the school's capacity, the CSA provides for certain allowable preferences to be applied, such as for students from the district, and then for a lottery system within those preference categories. The vast majority of the students who chose to enroll at EOCC were former students from Hawthorne Elementary School. Under the terms of the CSA, the Employer/Petitioner was prohibited from charging any of these students tuition.<sup>13</sup>

#### The EOCC Teaching Staff and Their Terms and Conditions of Employment

With regard to the teaching staff, the CSA gives a charter school operator the power to hire its own teachers and administrators. However, the Employer/Petitioner's hiring discretion is tempered by provisions in the CSA and the federal No Child Left Behind Act. These federal and state laws mandate that all charter school teachers possess a valid state teaching credential.<sup>14</sup> California state law further requires that all teachers in charter schools be fingerprinted and subject to background checks. Finally, while EOCC

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<sup>13</sup> By contrast, private schools are allowed to charge tuition, and are specifically prohibited under Article 9 §8 of the State Constitution from receiving any public funds.

<sup>14</sup> There is no comparable certification requirement for teachers in private schools.

was not legally required to hire any of the former staff from Hawthorne, about a quarter of the teachers it ultimately hired had previously been employed at that school.

With regard to how the wages and benefits of the charter school staff are determined, the starting point is §47605(b)(5)(O) of the CSA. This statute requires every charter school to elect whether its employees will be considered as employees of the chartering authority (i.e. the OUSD) for collective bargaining purposes, or whether the school will handle its own labor relations under the provisions of the EERA. EOCC chose the latter option. As required by the CSA, EOCC memorialized this selection in its charter. Thus, the charter declares:

EFC will be the exclusive public employer of all employees of the charter school for collective bargaining purposes. As such, EFC will comply with all provisions of the Educational Employment Relations Act (EERA), and will act independently from the OUSD for bargaining purposes. In accordance with EERA, employees may join and be represented by an organization of their choice for collective bargaining purposes.

Having chosen the option of being the exclusive public employer of the charter school's employees, the Employer/Petitioner thus obtained broad discretion to determine the wages and benefits to be paid to the staff. However, this discretion was not unfettered. Thus, under §47605(b)(5)(K) of the CSA, it was required to offer the certificated teachers the option of participating in the State Teachers Retirement System (STRS).<sup>15</sup> Moreover, while the Employer/Petitioner established its own procedures for teacher evaluations and performance, as well as its own criteria and procedures for staff discipline and termination, the broad outlines of each of these procedures were spelled out in the charter, and were subject to review and approval by the OUSD.

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<sup>15</sup>The other options offered the teachers are participation in the Public Employee's Retirement System or federal social security. The record did not establish that STRS represents anything other than what its name suggests, benefits for state employees.

### How the Day to Day Operations of EOCC Are Funded

Under the terms of the CSA and its charter, the Employer/Petitioner is prohibited from charging tuition to any of its students. Instead, it relies upon a variety of federal and state grants, as well as private donations. This stands in direct contrast to private schools, which are prohibited by federal and state law from receiving any public moneys and which rely, instead, on tuition charged to enrolled students, along with private donations.

In the 2005-2006 fiscal year, over 72 per cent of the revenues received by the Employer/Petitioner were from federal, state, and local funds. The balance of its revenues were from private grants and fund raising.<sup>16</sup>

With regard to the money received by EOCC from the state, §47630 of the CSA provides that charter schools in California are entitled to receive from the state “operational funding that is equal to the total funding that would be available to a similar (public) school district serving a similar pupil population.” The amount of state money that both charter and public schools receive is calculated based on their Average Daily Attendance (ADA) figures.<sup>17</sup> Roughly 80 per cent of the state money flowing to both public and charter schools is in the form of general apportionment grants – money that can be used for any purposes consistent with the school’s educational mission. The other

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<sup>16</sup> Employer Exhibits 1 and 2 detail the revenues that the Employer/Petitioner received in the 2005-2006 fiscal year for the operation of both EOCC and Cox Elementary School. For the two schools combined, the Employer/Petitioner received about \$1,174,000 in federal funding; \$6,431,000 in general block state funding; \$1,451,000 in other state funding; \$663,000 in local funding (in lieu of property tax funds); and \$3,680,000 in private grants and fundraising. Federal funding flows first to New Schools Venture Fund and is then disbursed in appropriate amounts to Cox Elementary and EOCC. Employer/Petitioner witness Wilcox estimated that this revenue was divided up between Cox and EOCC based roughly upon the number of students enrolled in each school (about 600 at EOCC and 685 at Cox), with some portion also being utilized to fund the activities at the Employer/Petitioner’s corporate offices.

<sup>17</sup> Both charter and public schools are required to file these reports at least twice a year in order to receive their appropriate apportionment grants. Since private schools are precluded by law from receiving state money, they do not have to file these reports.

20 per cent is in the form of categorical grants. For public schools, this categorical block grant money has been targeted by the legislature to a specific student population or to a specific type of required instruction. By contrast, charter schools can use their categorical block grants without specific targets or restrictions, as long the money's use is consistent with the school's charter. This gives the charter school greater fiscal flexibility than a traditional public school. Finally, both public and charter schools are eligible to receive money raised by state bond measures for school construction and modernization, and they both receive in lieu of property tax money that is channeled through the local school district.

Under §47630(b) of the CSA, a charter school is entitled to elect how it will receive this money from the state. One option is called local funding, whereby the state general apportionment and categorical block money is channeled through the local school district. The other option is called direct funding, under which this same state money would be channeled through the County Office of Education. According to the Employer/Petitioner, it chose the direct funding option so that it could receive the money more quickly and could reduce the amount of control the district would have over its operations. In addition, the direct funding option gives the charter school the ability to apply individually for a wide variety of other available state funding programs and grants. By contrast, choosing the local funding option would mean that the charter school would have to rely on the school district to apply for these funds, and it would only receive from the school district a proportional share of any such funds received.

### The EOCC Curriculum

In California, charter schools have greater flexibility with regard to curriculum than do public schools. California public schools are subject to provisions in the state Education Code which mandate to some extent the curriculum, textbooks, and courses that they offer. California public schools are also subject to a host of rule based standards requiring a specified number of minutes of instruction per week in certain subjects. By contrast, under the terms of the CSA, charter schools are granted much greater flexibility in curriculum, textbooks, and course offerings. Moreover, they are not subject to the same requirements specifying a fixed number of instructional minutes per day or week on particular subjects. Nevertheless, charter schools are still subject to annual instructional minute requirements and charter school students must still meet the state mandated AYP (average yearly progress) goals. Moreover, the CSA requires charter schools to set forth in their charter petition the educational philosophy and program of the school. This philosophy and program is required to identify the type of students the school seeks to educate; the educational goals and “measurable pupil outcomes” it seeks to achieve; the method by which these outcomes will be measured; and a general description of how the charter school expects to achieve those goals.

Section 47601 of the CSA explains that the legislative intent behind this greater flexibility is to provide opportunities for teachers, parents, pupils, and community members to establish and maintain charter schools that operate independently from the existing school district structure, utilizing different and innovative teaching methods, as a means to improve pupil learning. Nevertheless, §47601 concludes that the ultimate goal of this increased flexibility is to “provide parents and pupils with expanded choices

in the types of educational opportunities that are available **within the public school system**” and to “provide vigorous competition **within the public school system** to stimulate continual improvements in all **public schools.**” (emphasis added).

EOCC’s charter adopts this same approach to flexibility in curriculum that is encouraged by the CSA, but makes it clear that it is doing so under the ultimate control and oversight of the public school system. Thus, in the “Curriculum and Instructional Design” section of EOCC’s charter it states:

EFC will correlate its curriculum objectives to the California Content Standards adopted by the California State Board of Education. The school’s focus is not to change what the state feels are appropriate academic outcomes, but rather to ensure that all students master all areas of the California Content Standards. The California Content Standards will be combined with the pedagogical methodologies that have proven successful in other charter and traditional district schools.... In accordance with state regulations, EFC will provide the standard age-appropriate curriculum for Mathematics, Science, English-Language Arts, History-Social Science, Visual-Performing Arts, and Technology at each grade level.

OUSD Charter School Coordinator Zimny determined that the charter proposed to utilize existing curriculum programs that the district was already familiar with and enthusiastic about. Therefore, Zimny recommended that this section of the EOCC charter be approved.

#### Oversight of EOCC by the OUSD and the State

Since the time that EOCC opened its doors in late-August 2005, it has been subject to consistent oversight and review by the OUSD. In EOCC’s charter it states that the school will annually:

[C]omplete a cycle of inquiry in which all collected student data including test scores, daily attendance records, examples of student work and student/parent surveys will be evaluated, strengths and weaknesses will be identified, and a course for school wide improvement and growth will be

charted for the upcoming year. Additionally, the school's financial health will be examined. Results of this inquiry, including data reflecting success or failure to reach outcome goals, will be reported to all stakeholders including OUSD in a published annual report.

The oversight responsibilities of the OUSD are further set forth in §47604.32 of the CSA, which states that each chartering authority is required to identify one staff member as a contact person for each charter school; to visit each charter school at least annually; to ensure that the charter school complies with all reporting requirements; and to monitor the fiscal condition of the school. To enable the chartering authority to carry out this fiscal oversight responsibility, §47604.33 of the CSA requires each charter school to annually prepare and submit to the chartering authority and the County Superintendent of Schools a preliminary budget by July 1; an interim financial report by December 15; a second interim financial report by March 15; and a final unaudited report for the full prior year by September 15. These interim financial reports are reviewed by the OUSD fiscal staff to ensure itself that the charter school has sufficient fiscal resources to implement the goals set forth in the charter. While the OUSD has no line item veto authority, if it concludes that the school is operating in a fiscally unsound manner, it has the right to ask the charter school to revise its policies and, if the school refuses, it retains the ultimate weapon of being able to revoke the school's charter.

In addition to the foregoing oversight provisions, the CSA also requires every proposed charter to set forth "measurable pupil outcome" goals and to describe the method by which these outcomes will be measured. In practice, the CSA requires every public school and every charter school to give all of their students a series of standardized tests, such as the STAR Test, the CAT 6, and the California Standardized Test (CST). These tests are composed by the State, EOCC teachers administer the tests to the EOCC

students, the completed tests are returned to the State, and the State scores the tests and reports the results back to the school. As will be explained in detail below, these test scores are used by the chartering authority to evaluate each charter school and to help determine if the school's charter should be revoked or renewed.

### Special Education Services

In its charter, EOCC explicitly recognizes that, as a charter school, it is legally obligated to provide “all students with disabilities ... a free, appropriate public education.” To this end, the EOCC charter contains a Section 2(E) entitled “Plan For Special Education.” This section states that EOCC “recognizes its responsibility to enroll and assist students with disabilities (and that) disability will not be used as a criterion for ineligibility for enrollment.” Rather, the EOCC charter affirms that the charter school is bound by and agrees to adhere to various federal and state laws affecting students with exceptional needs, including “all provisions of PL 94-112, the Individual With Disabilities Education Act (IDEA), its amendments, Section 504 of the Rehabilitation Act, the Americans With Disabilities Act, Office for Civil Rights mandates, and AB 602.” Finally, the EOCC charter affirms that “the School shall be deemed to be a public school of the District for purposes of special education pursuant to Education Code §47641(b) (and that) a child with disabilities attending the charter school shall receive special education instruction and designated instruction and services ... in the same manner as a child with disabilities who attends another public school within the District.”

In practice, the way that EOCC has chosen to fulfill its recognized legal responsibilities towards students with disabilities is that it has contracted with the OUSD for these services. Thus, EOCC pays \$200 per each student enrolled at the school to the

OUSD, regardless of whether those students have disabilities. In return, the OUSD has agreed to provide special education services to those few EOCC students who fall within the special needs category.

By contrast, under the express terms of the statutes, private schools in California are not bound to federal laws like the Individuals With Disabilities Education Improvement Act Of 2004 (PL 108-446, 118 Stat 2647); the Individuals With Disabilities Education Act (20 U.S.C. §1400); or the Education of the Handicapped Act (PL 94-142, 89 Stat 773). Similarly, private schools (unlike public and charter schools), are not deemed to be local educational agencies within the meaning of §47641 of the State Education Code and are thus not obligated to enroll and provide substantially equivalent educational services to students with disabilities.

#### The OUSD's Authority to Revoke or Decline to Renew EOCC's Charter

The ultimate form of oversight exercised by a chartering authority over a charter school is its authority to either revoke its charter or fail to renew it upon the expiration of its term. In this regard, §47607 of the CSA grants the chartering authority the power, after giving notice and a reasonable time to correct, to revoke a charter during its term for a material violation of any of the terms of the charter; for failure to meet or pursue designated pupil outcomes; for fiscal mismanagement; or for a violation of any provisions of the law. Section 47604.5 of the CSA also grants the State Board of Education the power to revoke a charter, whether or not it is the chartering authority, for gross fiscal mismanagement; illegal or improper use of charter school funds; and/or substantial and sustained departure from measurably successful educational practices

The OUSD has had occasion in the past to revoke the charters of three charter schools. On several other occasions, it has notified charter schools that they risked revocation if they did not take corrective action.<sup>18</sup> The reasons that the OUSD has relied upon to revoke charters have been fiscal mismanagement; failure to enroll a sufficient number of students; and/or failure of the school to achieve the necessary academic performance levels. These kinds of problems come to the attention of the OUSD through its exercise of oversight and reporting responsibilities, including through complaints from employees, students, parents, and vendors; a review of average daily attendance records; a review of financial statements; and monitoring of academic test scores.

Section 47607 of the CSA also describes the procedures to be followed for renewal of a charter. A charter can be granted for a period of time not to exceed five years. When the charter has one more year to go before its designated expiration date, the chartering authority must determine, subject to review by the state Superintendent of Public Instruction, whether to renew its charter. The factors to be evaluated include whether the school has achieved its Academic Performance Index (API) target; whether the charter school was ranked in deciles 4 to 10 of the API for demographically comparable schools; and whether the academic performance of the charter school is at least equal to the academic performance of the public schools that the charter school pupils would otherwise have been required to attend. This is an outcome based review process, which measures results rather than the particular methods employed by a charter school to achieve these results.

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<sup>18</sup>There have been a total of around 760 different charters that have been issued statewide since the CSA went into effect in 1992. Of this total, about 575 are still active. About 40 of the charter schools that ceased operations did so because their individual charters were revoked, either by the State or the chartering authority.

## **ANALYSIS**

The sole issue before me is whether EOCC, a charter school, is a private employer subject to the Board's jurisdiction. The Employer/Petitioner contends that it is. The Union and PERB contend that EOCC is exempt from the Act's coverage because it is a political subdivision of the State of California and that, accordingly, the instant petition must be dismissed.

Section 2(2) of the Act defines the term 'employer' to include "any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any State or political subdivision thereof . . ." While neither the Act nor its legislative history defines a "political subdivision," in *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600 (1971), the Supreme Court of the United States adopted the Board's definition that an entity is a political subdivision if it is either: 1) created directly by the state so as to constitute a department or administrative arm of the government; or 2) administered by individuals who are responsible to public officials or to the general electorate. *Id.* at 604-605. The record establishes, and I find, that EOCC is a political subdivision of the State of California under both prongs of the *Hawkins* test. Thus, the Board does not have jurisdiction over the Employer/Petitioner at EOCC.

### **EOCC is a Statutorily Created Public School**

#### **1. The Relevant State Law**

Although Federal law, not state law, is controlling in determining whether an entity is a political subdivision, state law must nonetheless be given "careful consideration." *Id.* at 602. The Board thus considers the state's enabling legislation or

intent in deciding whether an employer is exempt from the Act's coverage. *Research Foundation of the City University of New York*, 337 NLRB 965, 968 (2002).

In California, the enabling legislation for charter schools is the CSA. Prior to its passage, there were no charter schools in the state. Instead, there were only traditional public schools and private schools. For its part, the California public school system was directly established by state law and run by state officials. In this regard, Article 9, §5 of the California Constitution provides: "The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year a school has been established."

Unlike public schools, private schools are free to select which pupils they want to enroll; they can charge tuition; they are not subject to state oversight of their curriculum and budget; they are not required to provide special education services; they are not subject to the same testing and measurable student outcome standards, and they are prohibited by law from receiving any public moneys.

Charter schools first came into existence in California in 1992, with the passage of the Charter School Act, a part of the State Education Code. The state legislature's declared purpose for enacting the CSA was "to provide opportunities for teachers, parents, pupils and community members to establish and maintain schools that operate independently from the existing school district structure" in order to, among other things, improve student learning, encourage innovative teaching, (and) expand educational choices. However, while the State legislature decided to grant charter schools some degree of independence from the existing public school system, the CSA also made it clear that the purpose of this increased freedom was not to remove charter schools from

the public school system, but, rather, to “provide vigorous competition within the public school system.” Cal. Educ. Code §47601.

Thus, the CSA, in conjunction with the California Constitution, specifies that charter schools are recognized as “public schools” in California and they are considered part of local and state government. In this regard, §47615 of the CSA specifically states that the state legislature, in enacting the CSA, intended to make charter schools “part of the public school system,” under the jurisdiction of the public school system, and in the exclusive control of the officers of the public schools. Further, Article 9, §6 of the State Constitution makes it explicitly clear: “No school or college or any other part of the Public School System shall be, directly or indirectly, transferred from the Public School System or placed under the jurisdiction of any authority other than one included within the Public School System.” Finally, Article 9, §8 states: “No public money shall ever be appropriated for the support of ... any school not under the exclusive control of the officers of the public schools . . . .”

## 2. Board Case Law

In a number of cases, the Board has found that it lacks jurisdiction over employer’s whose operations were set up under circumstances similar to those of EOCC. For example, in *Hinds County Human Resources Agency*, 331 NLRB 1404 (2000), the Board found that an agency administering low-income assistance programs in Mississippi was exempt from the Act’s coverage under the first prong of the *Hawkins* test because the state’s enabling statute demonstrated the legislature’s clear intent that local government retain control over the agency. The Board reasoned that the state’s characterization of an entity, through administrative rulings, was an important factor in determining the more

specific question of whether an employer was created so as to constitute a department or administrative arm of the government. The Board further relied on the state's significant control over the agency's funding, budgeting and auditing, as well as the agency's tax-exempt status and participation in the state retirement system when it held that it lacked jurisdiction over the agency.

Here, as in *Hinds County*, the California state legislature expressed its intent in the enabling statute that the government retains control over public charter schools. Cal. Ed. Code §47615(a)(1). Just as in *Hinds County*, California government officials have repeatedly ruled that public charter schools are subdivisions of the state. In *Options for Youth-Victor Valley, Inc.*, (2004) PERB Decision No. 1701, PERB held that public charter schools are political subdivisions of the state due to the numerous government controls provided for in the CSA. In *Wilson v. State Board of Education*, 75 Cal. App. 4<sup>th</sup> 1125 (1999), the California Court of Appeals explained the government controls as follows:

. . . charter schools are *strictly* creatures of statute. From how charter schools come into being, to who attends and who can teach, to how they are governed and structured, to funding, accountability and evaluation – the Legislature has plotted all aspects of their existence. Having created the charter school approach, the Legislature can refine it and expand, reduce or abolish charter schools altogether. *Id.* at 1135 (emphasis in the original).

Accordingly, even though charter schools operate independently from local school districts on a day-to-day basis, the *Wilson* court held that “charter school officials are officers of public school Districts.” *Id.* at 1141. The court found that state officials retain “exclusive control” over charter schools based on their power to issue and revoke charters and their oversight responsibilities.

Similarly, in *Jarvis Public Library Assn.*, 262 NLRB 1386 (1982) the Board concluded that the employer, a library, was a state-authorized educational facility and an administrative arm of the state notwithstanding that the library's director and its board of trustees exercised significant operational autonomy in the day-to-day operation of the library. The Board based its conclusion on the following: (1) the city and state exercised significant control over the library's expenditures by reason of the required submission of an annual budget to each prior to funding approval; (2) the library's employees were covered under the city's health insurance plan and the state's retirement system; and (3) the library's revenue was largely derived from the city, county and state. Just like the library at issue in *Jarvis*, EOCC is funded primarily by the state; it is required to submit interim and yearly financial reports to OUSD, the county and the state; and its teachers participate in the State Teachers Retirement System. Thus, like in that case, it is not controlling that officers of the Employer/Petitioner exercise significant control of the charter school's day-to-day operations.

3. Application of This Case Law to the Instant Case  
Compels the Conclusion That EOCC is a Political Subdivision

As is detailed extensively in the "Facts" section, *supra*, although the Employer/Petitioner was initially organized as a private Section 501(c)(3) corporation, once it decided to go into the business of operating EEOC – a charter school formed under the California Education Code – it became subject to all of the statutory restrictions, regulations, and privileges set forth in the CSA. Thus, unlike a private school, EOCC was able to apply for and receive a \$360,000 startup grant from the California State Department of Education. To function as a charter school, the Employer/Petitioner was then required by the CSA to develop and submit a charter

petition for EOCC to the OUSD. This charter petition was required to track and comply with the statutory requirements set forth in the CSA, including the 16 elements set forth in §47605. The EEOC charter was also required by law to set forth other key elements, such as agreements to admit all public students who chose to enroll; to not charge tuition; and to be non-sectarian and non-discriminatory. After the draft charter petition was submitted to the chartering authority, the OUSD mandated, as a condition of approving it, that certain revisions had to be made to bring it in conformity with the CSA. Furthermore, statutorily required public meetings and hearings had to be held before the draft petition was approved. Had EOCC been a traditional California private school, none of these requirements would have applied.

Further evidence that EOCC constitutes “a department or administrative arm of the government of the state” is found in the fact that, since EOCC commenced operations, it has received the bulk of its funds from the State and the federal government. Thus, EOCC’s 2005-2006 budget reflects that it received roughly \$500,000 in federal funding; \$2,765,000 in general block state funding; \$624,000 in other state funding; and \$285,000 in local in lieu of property tax funds.<sup>19</sup> No private school is entitled to receive these types of federal or state moneys.

The final critical element in establishing that EOCC was “created directly by the state” is the fact that both the OUSD, as the chartering authority, and the State Board of Education, each possesses the ultimate authority to revoke EOCC’s charter. As spelled out in the CSA, the grounds on which a charter can be revoked include a material

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<sup>19</sup> The record reflects that some unspecified portion of these amounts do not go to EOCC, but are used to cover administrative expenses for the Employer/Petitioner’s central offices. This fact does not alter my conclusion herein.

violation of any of the terms of the charter; failure to meet or pursue designated pupil outcomes; fiscal mismanagement; illegal or improper use of charter school funds; and/or a violation of any provisions of the law. The record reflects that some 40 charter schools in California have had their charters revoked since the passage of the EOCC in 1992, and the OUSD has itself revoked the charters of three schools.

All of the above-factors, compel a conclusion that EOCC, as a charter school in California, was created pursuant to the CSA, and it functions as part of the public school system.

4. The Employer/Petitioner's Arguments on Brief

In its brief, the Employer/Petitioner asserts that it does not meet the first prong of the *Hawkins* test because it was not created directly by the state so as to constitute a department or administrative arm of the government. Rather, the Employer/Petitioner contends that it is a privately created Section 501(c)(3) corporation; that it selects its own Board of Directors with only minimal input from the OUSD; that it determines its own labor relations policies; that it has complete freedom to hire and fire its own teaching and administrative staff; and that it has a large degree of autonomy in creating its budget and determining its curriculum. In support of this position, the Employer/Petitioner relies primarily upon *Children's Studio School*, 343 NLRB No. 89 (November 30, 2004); and *C.I. Wilson Academy*, 2002 NLRB Lexis 364.

The Employer/Petitioner's reliance on these cases is misplaced. With regard to the *Children's Studio School* case, I note that the employer admitted in its Answer that it was an employer engaged in commerce within the meaning of Section 2(2) of the Act, so no evidence was taken on that subject and the issue of whether the school was a political

subdivision was not litigated. Therefore, the Board's decision adopting the administrative law judge's recommended order in *Children's Studio School* has no precedential value in this regard. Moreover, *C.I. Wilson Academy* is a decision by an administrative law judge that was never adopted by the Board. Therefore, it has no precedential value in the instant case, especially in light of Board decisions cited herein.

Turning to the substance of the Employer/Petitioner's arguments, it is true that the Employer/Petitioner is a Section 501(c)(3) corporation with its own Board of Directors that essentially makes its own labor relations decisions. However, once this corporation decided to open a charter school, it was required to comply with and submit to the myriad of regulations and statutory requirements (detailed, *supra*) that are set forth in the State Education Code. In examining the impact of these statutory requirements, I reject the Employer/Petitioner's arguments on brief that "charter schools are exempt from most state educational regulations (and that) the few laws that charter schools are obligated to abide by deal with matters that are so basic – such as minimum age requirements and building code regulations – that even private schools would comply with them." That argument ignores State Education Code requirements (set forth in detail in the Facts section *supra*) which mandate, *inter alia*, submission of a detailed charter petition for approval; enrollment of all students who apply; obligations to educate special education students; requirements to adopt and apply non-sectarian and non-discriminatory education policies; a ban on charging students tuition; and a requirement that budgets and audits be submitted for approval.

##### 5. Conclusion Regarding the First Prong of the *Hawkins* Test

The CSA makes clear that the California legislature intended public charter schools to be part of the public school system and under the jurisdiction of the public school system, and therefore, subdivisions of the state. This legislative intent has been recognized and upheld by California courts. It is also clear that EOCC is predominantly funded by the state and is financially accountable to the state. Moreover, EOCC's charter was authorized by the state and can be revoked by the state. Thus, I find that EOCC was "created directly by the state so as to constitute a department or administrative arm of the government" and is, therefore, a political subdivision of the state under the first prong of the *Hawkins* test. *NLRB v. Natural Gas Utility District of Hawkins County, Tennessee*, 402 U.S. 600, 604-605 (1971). Accordingly, I find that EOCC is exempt from the Act's coverage.

##### **EOCC is Administered by Individuals Responsible to Public Officials**

Although an entity need only meet one prong of the *Hawkins* test to be exempt from the Act, I find that EOCC meets the second prong of the test because it "is administered by individuals who are responsible to public officials or to the general electorate." *Id.* at 604-605.

On brief, the Employer/Petitioner disputes this conclusion. Just as it did regarding the first prong, the Employer/Petitioner relies upon the fact that it is a Section 501(c)(3) corporation with a largely independent Board of Directors that makes its own decisions with regard to labor relations matters. The Employer/Petitioner also points to sections of the State Education Code that grant charter schools more autonomy than traditional public schools in matters of curriculum; teaching methods; teacher

evaluations; discipline and expulsion of students; and rights to contract with outside vendors. However, I find that these factors are outweighed by evidence establishing conclusively that EOCC is administered by officials who are “responsible to public officials or the general electorate.”

As a starting point, I note that over 72 per cent of the funds needed to operate EOCC come from state, federal, or local district funds.<sup>20</sup> In order to obtain money from the State, EOCC is required to compile and submit Average Daily Attendance reports to the state. Moreover, under the terms of the CSA, the Employer/Petitioner’s Board of Directors is directly accountable to public officials for how this public money is spent. In this regard, EOCC can only spend public money in accord with the principles set forth in its charter and it must provide four interim financial reports to OUSD each year. EOCC is also required by the CSA and its charter to submit annual independent financial audits to OUSD, the county Office of Education, the California Department of Education, and the California Controller. Although no state office has ever responded to EOCC’s financial audits, the state nonetheless possesses the authority under the CSA to revoke EOCC’s charter if the audits reveal gross financial mismanagement, illegal or substantially improper use of school funds, or the failure to use generally-accepted accounting principles. The fact that this ultimate accountability to public officials regarding EOCC’s finances is real, rather than speculative, is established by evidence reflecting that the state and/or local chartering authorities have exercised such authority to revoke the charters of a number of other charter schools that have been found guilty of fiscal mismanagement.

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<sup>20</sup> The fact that EOCC receives about 28 per cent of its annual funding from private sources is not dispositive of the jurisdiction issue. See, e.g., *N.Y. Institute for the Blind*, 254 NLRB 664, 667 (1981).

With regard to curriculum, while charter schools have some greater flexibility than traditional public schools, this flexibility is possible only within fixed parameters established by the state. Thus, in its charter, EOCC promised to “correlate its curriculum objectives to the California Content Standards adopted by the California State Board of Education” and “not to change what the state feels are appropriate academic outcomes, but rather to ensure that all students master all areas of the California Content Standards.” When the OUSD reviewed the draft charter EOCC, one factor that led to its approval was the fact that the school proposed to adopt existing curriculum programs that the district was familiar with and enthusiastic about.

State oversight of curriculum is further evidenced by extensive state and school district oversight of student academic progress at EOCC. In this regard, there is a host of reporting and accountability provisions built into the CSA that demonstrate that EOCC is ultimately responsible to public officials for the academic progress of its students. First, §47605 of the CSA requires every charter school to describe in its charter the proposed educational program of the school, the educational outcomes that the charter operators commit to achieving, and how that academic success will be measured. Second, as a charter school, EOCC is required to administer a series of California standardized tests to its students and to report these results to the state and the district. EOCC’s ultimate accountability to public officials in this area is reflected by the fact that EOCC’s charter can be revoked if its students fail to achieve the measurable student outcomes and progress promised in its charter.

There are a host of other accountability requirements built into EOCC’s charter. Thus, the Employer/Petitioner’s Board of Director meetings are noticed and open

pursuant to California's Brown Act for public agencies; EOCC can only hire teachers who possess the teacher credentials required by the CSA; EOCC must conduct a criminal background check and fingerprinting of each teacher; EOCC must select textbooks from a state-approved list; and EOCC must comply with the CSA's requirements for the number of minutes and days of instruction.

Finally, the CSA includes still further provisions to monitor EOCC's compliance with statutory requirements. Thus, a county superintendent of schools may, based upon written complaints by parents or other information that justifies the investigation, monitor the operations of a charter school located within its jurisdiction and conduct an investigation into the operations of that school. Cal. Educ. Code § 47604.4.

In sum, while the Employer/Petitioner's Board of Directors makes governance decisions for the school, EOCC is not excused from many regulations and reporting requirements that apply to all public schools.<sup>21</sup>

#### Conclusion Regarding the Second Prong of the *Hawkins* Test

Based on the foregoing and the record as a whole, I find that the state and OUSD's authority to require that EOCC's charter comply with the terms of the CSA; the audit, budget, and financial oversight provisions built into the CSA; the statutory oversight provisions regarding curriculum and student progress; and the OUSD's right to appoint a representative on the Employer/Petitioners' Board of Directors, along with the State and the OUSD's ultimate oversight power to revoke EOCC's charter for non-

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<sup>21</sup> On brief, the Employer/petitioner cites *Economic Security Corp.*, 299 NLRB 562, 565 (1990); *FiveCAP, Inc.*, 331 NLRB 1165 (2000); and *Museum of Fine Arts*, 218 NLRB 715 (1975), for the proposition that "the Board will only find that the second prong (of the *Hawkins* test) is met if a *majority* of an entity's Board of Directors is shown to be 'responsible to public officials of the general electorate.'" However, these cases hold only that this is just one of many factors to be considered in determining this issue.

compliance with the CSA, sufficiently demonstrate that the Employer/Petitioner is accountable to public officials for the operation of EOCC. Accordingly, I find that EOCC is exempt from the Act's coverage under the second, as well as the first, prong of the *Hawkins* test.

### **CONCLUSIONS**

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Upon the entire record in this proceeding, including the parties' arguments made at the hearing and in the briefs, and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. With regard to commerce jurisdiction only, the parties stipulated, and I find, that the Employer/Petitioner is a California nonprofit corporation that is engaged in the operation of a public charter school in Oakland, California. During the past 12 months, a representative period, the Employer/Petitioner has derived gross revenues in excess of \$1,000,000. During the same period, the Employer/Petitioner has purchased and received goods valued in excess of \$50,000 that were shipped directly to its facility from points located outside the State of California. Thus, notwithstanding my conclusion that the Employer/Petitioner is exempt from the Board's jurisdiction regarding labor relations at EOCC, I find that the Employer/Petitioner is otherwise engaged in commerce within the meaning of the Act.

3. The parties stipulated, and I find, that notwithstanding my conclusion that the Board does not have jurisdiction over EOCC, the appropriate collective bargaining unit otherwise consists of the following:

All full-time and regular part-time certificated employees employed by EOCC at its 1700 28<sup>th</sup> Avenue, Oakland, California facility; excluding all other employees, Administrators, guards, and supervisors as defined in the Act.

4. The parties declined to stipulate regarding whether the Union is a labor organization within the meaning of the Act and claims to represent certain employees of the Employer/Petitioner at EOCC. At the hearing, the hearing officer advised the parties that the hearing was being bifurcated on this point. Accordingly, no evidence was taken regarding the labor organization status issue pending resolution of the jurisdiction issue.

5. I find that EOCC is a political subdivision exempt from the Act's coverage; therefore, while a question concerning representation of certain employees of EOCC may exist, said question falls outside the statutory authority of the Board.

## **ORDER**

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by the Board in Washington by May 24, 2006.

DATED AT Oakland, California, this 9<sup>th</sup> day of May, 2006.

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